Supreme Court, U.S.
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No. 06-513

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

GEORGE T. FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A habeas petitioner seeking to overcome the procedural default of a claim must show both "cause" and "prejudice" under *Wainwright v. Sykes*, 433 U.S. 72 (1977). Often, a petitioner seeks to use ineffective assistance of counsel to show "cause" under *Sykes*. To do so, he must show both deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The question presented is:

> Does a petitioner's showing of prejudice under *Strickland*, as part of meeting the "cause" prong of *Sykes*, automatically satisfy *Sykes*'s separate "prejudice" prong, or must a petitioner still independently show prejudice under *Sykes*?

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary. (Carl T. Anderson, Respondent-Appellee Below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held.)

The Respondent is George T. Franklin, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Marc C. Houk, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2006), is reproduced at App. 1a-36a. The Sixth Circuit's denial of rehearing en banc is reproduced at App. 37a. The Decision and Entry of the United States District Court for the Southern District of Ohio, 267 F. Supp. 2d 768 (S.D. Ohio 2003), is reproduced at App. 38a-87a. The Magistrate's Report and Recommendations is reproduced at App. 88a-341a. The Magistrate's Amended Supplemental Report and Recommendations is reproduced at App. 342a-355a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on January 9, 2006. The Sixth Circuit denied the Warden's petition for rehearing and suggestion for rehearing en banc on May 9, 2006. The Warden timely filed this petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

INTRODUCTION

Most habeas petitions, and virtually all petitions in capital cases, include a claim of ineffective assistance of counsel. This case provides the Court an opportunity to resolve a conflict among the circuits that arises from the fact that such claims can play a dual role in habeas—serving either as a substantive claim for relief, or as a gateway to allow federal courts to consider otherwise defaulted claims. In particular, the circuits are split as to whether the showing of prejudice required under *Strickland v. Washington* to show

ineffective assistance as a substantive claim is also enough, in and of itself, to show the prejudice necessary under *Wainwright v. Sykes* to excuse procedural default. As more fully described below, this issue has particularly important ramifications for ineffective assistance of *appellate* counsel claims.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a claim of ineffective assistance can serve as a substantive basis for relief in habeas. To demonstrate ineffectiveness for this purpose, a petitioner must show both deficient performance and resulting prejudice. To show prejudice, a petitioner must show that there is a "reasonable probability" that, but for the deficient performance, the outcome of the hearing would have been different. If he makes such a showing, he is entitled to a new hearing with effective counsel. So, for example, if a petitioner received constitutionally ineffective assistance of appellate counsel, the petitioner is typically entitled to a new appeal in state court.

Separately, ineffective assistance can also serve as a "gateway" that allows federal courts in habeas to consider the merits of otherwise procedurally defaulted constitutional claims. That is, as a general matter, where a habeas petitioner has failed to present a claimed constitutional error in state court (as Franklin failed to present his ultimate claim here, a juror bias claim), the claim is deemed to be "procedurally defaulted," and the petitioner cannot rely on that error as a basis for habeas relief. Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), however, there is an exception to the general rule: if a petitioner can establish both "cause" and "prejudice," the federal court can overlook the procedural default and reach the merits of the otherwise-defaulted claim. In this procedural context, ineffective-assistance claims play a key role, as the Court has recognized that ineffectiveness of counsel can satisfy *Sykes*'s "cause" prong. In other words, a showing of "deficiency" and "prejudice," as *Strickland*

defines those terms, suffices to show "cause" for *Sykes* purposes.

The confusion among the circuits arises because *Sykes* also separately requires "prejudice," as part of the "cause" and "prejudice" formula. In other words, in relying on ineffectiveness to establish *Sykes* cause, petitioners must show *Strickland* prejudice, but *Sykes* itself *also* requires prejudice as a separate prong. The question then is whether *Sykes* prejudice requires an additional showing beyond *Strickland* prejudice. Some circuits, including the Sixth Circuit, treat the two as essentially identical. So if a petitioner establishes *Strickland* prejudice in showing ineffectiveness to meet *Sykes*'s cause prong, the court need not separately consider whether he also satisfies *Sykes*'s separate prejudice prong. Other circuits, recognizing that this would essentially eviscerate *Sykes*'s prejudice prong, insist that *Sykes* prejudice must logically require a higher showing than the *Strickland* prejudice relied upon to establish *Sykes* cause. Still other circuits have recognized that this is an open question, but have not resolved it.

This question is of particular importance where a petitioner is claiming ineffective assistance of *appellate* counsel. If the two prejudice requirements are separate, and the petitioner can meet only *Strickland* prejudice, then he should receive only a new appeal in the state court system with effective counsel. For those circuits that treat the two separate prejudice components as identical, however, the showing of *Strickland* prejudice (and hence *Sykes* prejudice) is enough to secure not only a new appeal, *but a new trial.* That is what happened here. The court below did not even consider the separate question of *Sykes* prejudice, but it instead used the prejudice component of Franklin's ineffective-assistance-of-appellate-counsel claim to order a *new trial.*

As this example demonstrates, the interaction of the two separate prejudice requirements is vitally important to the State's interests in the finality of its criminal judgments. Moreover, the circuits' differing treatment of prejudice in such cases means that as to those petitioners who advance claims of ineffectiveness assistance of appellate counsel, the remedy they receive—a new trial versus a new appeal—may turn solely on the circuit in which they reside.

The Warden thus respectfully asks the Court to grant his petition and address this important question.

STATEMENT OF THE CASE

A. Franklin murdered George Strauss while burglarizing Strauss's home.

On the morning of August 8, 1988, the badly beaten body of George Strauss was found in his townhouse in Cincinnati, Ohio. App. 96a. Investigators determined that several items were missing from the townhouse, including Strauss's money clip with several twenties, his credit cards, his watch, a VCR, a briefcase with personal papers, and a Marion brand claw hammer. In a wooded area a few blocks away, police found some of the items, including a bloodstained Marion brand claw hammer. The VCR, watch, and money were never recovered. App. 41a-42a.

The police immediately identified Franklin as a suspect, based on information implicating Franklin in another burglary committed in a similar fashion. Both crimes occurred in the same neighborhood, within seventeen days of each other. App. 95a-96a. Moreover, a latent fingerprint lifted from the champagne bottle in the townhouse matched those from Franklin's file. App. 96a.

Investigators learned that Franklin was with Michael Turnbolt earlier on the evening of Mr. Strauss's murder. Turnbolt later testified that both had been using drugs.

Franklin left at about 10:30 p.m., at which time he apparently had no money. Franklin returned and woke Turnbolt at about 2:30 a.m. App. 42a-43a. Franklin had $100 to $150 in ten- and twenty-dollar bills. Separately, Strauss's neighbor testified that she heard a horrible scream come from the direction of Strauss's condominium when she was out walking her dog at about 11:00 or 11:30 p.m. that night. App. 97a.

B. Franklin did not present his juror bias claim either at trial or during his direct appeal.

Franklin was eventually charged with aggravated murder and aggravated burglary, tried and convicted by a jury, and sentenced to death. App. 88a. Of particular importance here, during the jury selection process, his counsel did not object to seating Patricia Arthur (the juror who formed the basis for his jury bias claim in federal court) on the jury. Franklin appealed to the Ohio Court of Appeals, presenting six assignments of error. App. 98a-100a. His claimed errors did not include a juror bias claim. The Ohio Court of Appeals affirmed the convictions and sentence. App. 101a. Franklin then appealed to the Supreme Court of Ohio, reasserting the same six errors. App. 101a-104a. The Supreme Court of Ohio affirmed the judgment and, as required by statute, independently reviewed the circumstances of the case and determined that Franklin's death sentence was appropriate. App. 39a. That court denied Franklin's motion for rehearing, and this Court denied his petition for certiorari. App. 104a.

Franklin then moved the Ohio Supreme Court to reopen his case. He alleged that he had received deficient assistance of appellate counsel during his direct appeal. Two of the ten issues on which Franklin sought to file a "supplemental brief" included claims that the trial court failed to grant a mistrial based on the actions of juror Patricia Arthur, and that trial counsel was ineffective in failing to challenge Arthur for

cause. App. 104a-106a. The Supreme Court of Ohio denied the motion without opinion. App. 43a, 106a-107a.[1]

Shortly thereafter, Franklin filed a petition for post-conviction relief in the trial court, alleging sixty-three grounds for relief. App. 107a-119a. Among these was the claim that his convictions and sentence were "void or voidable because the service of a biased juror on the jury in Petitioner's case violated his right to trial by a fair and impartial jury and to due proc ss." App. 108a. The trial court denied Franklin's claim, because he failed to present it on direct appeal. The Ohio Court of Appeals affirmed that decision. App. 123a. The Ohio Supreme Court declined discretionary review, see *State v. Franklin*, 72 Ohio St. 3d 1538 (1995), as well as Franklin's later Motion for Reconsideration, see *State v. Franklin*, 73 Ohio St. 3d 1429, 652 N.E.2d 801 (1995). This Court then again denied certiorari. *Franklin v. Ohio*, 516 U.S. 950, 116 S. Ct. 394, 133 L. Ed. 2d 315 (1995). App. 126a.

While his post-conviction proceedings were pending, Franklin also filed a Motion for Delayed Reconsideration with the original appellate court, seeking to reopen his direct appeal. Franklin alleged that his appellate counsel had been constitutionally ineffective for failing to raise, or for ineffectively arguing, thirty-three other assignments of error, including the juror bias claim relied on by the court below. App. 126a-132a. The state appeals court denied Franklin's request for delayed reconsideration, stating that Franklin had failed to show good cause why he had not applied for reconsideration within ninety days of the court's judgment on direct appeal, as Ohio law requires. App. 132a. Franklin then

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[1] In Ohio, ordinarily a claim not presented to the Ohio Court of Appeals will not be considered upon later appeal to the Supreme Court of Ohio. See *State v. Williams*, 51 Ohio St. 3d 112 (1977), paragraph 2 of the syllabus.

appealed, but the Ohio Supreme Court summarily dismissed the case. App. 132a-133a.

C. The federal courts granted Franklin's habeas petition based on his juror bias claim, and required the state to give Franklin a new trial.

Franklin filed his habeas petition in the United States District Court for the Southern District of Ohio, alleging twenty-eight grounds in support of relief. App. 89a-95a, 128a. The juror bias claim was reflected in three of those grounds. Franklin's first claim was that he received constitutionally ineffective assistance of appellate counsel for a variety of reasons, including counsel's failure to raise the juror bias claim as well as counsel's failure to raise trial counsel's effectiveness. App. 89a, 314a-315a. As his second ground for relief, Franklin alleged that his trial counsel were constitutionally ineffective for failing to move for either cause-based or peremptory excusals of biased jurors. App. 89a. Finally, as his sixth ground for relief, Franklin asserted that including a biased juror on the panel violated his Sixth and Fourteenth Amendment rights to a fair and impartial jury and his right to due process. App. 90a.

In response, the Warden argued that the first, second and sixth grounds were procedurally defaulted. App. 174a. The magistrate judge rejected the Warden's procedural default defenses and recommended granting the writ on Franklin's sixth ground for relief (his juror bias claim), as well as on his first and second grounds for relief to the extent those ineffectiveness claims rested on the failure to press the juror bias claim. App. 206a. The magistrate judge recommended that the district court deny Franklin's other grounds for relief. 314a.

Both Franklin and the Warden filed objections to the magistrate judge's Report and Recommendations. App. 342a. The magistrate entered an Amended Supplemental Report and Recommendations, recommending the district court

overrule each party's objections. App. 354a. Franklin then filed additional objections to the Amended Supplemental Report and Recommendations. App. 45a. The district court overruled the parties' objections, and adopted the magistrate judge's Amended Supplemental Report and Recommendations, as supplemented by the district court's own decision. App. 86a. Specifically, the district court concluded that although Franklin had failed to raise his juror bias claim either at trial or on direct appeal, ineffective assistance of appellate counsel provided cause and prejudice to excuse the procedural default. App. 44a, 85a. In doing so, the court never discussed whether the standard for showing prejudice under *Strickland* was the same as, or different from, the standard for prejudice under *Sykes*.

The Warden appealed, and the Sixth Circuit affirmed in a 2-1 decision. As the lower court did, the Sixth Circuit concluded that Franklin had not defaulted his ineffective-assistance-of-appellate-counsel claim. App. 6a. The court also found that a non-defaulted ineffective assistance claim, if meritorious, could serve as "both cause and prejudice, excusing a procedural default in an underlying substantive claim" (i.e., the juror bias claim). App. 5a. In assessing whether Franklin had proven prejudice here, however, the court never differentiated between the concept of "prejudice" for purposes of showing ineffective assistance (i.e., what this petition refers to as *Strickland* prejudice), and the prejudice necessary to meet the "actual prejudice" standard from *Sykes* to excuse a procedural default. App. 13a-28a, 33a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition presents an important question about ineffective assistance claims in habeas, on which the circuits are cleanly divided. The question here arises largely because

such claims pull double duty in habeas. Ineffective assistance of counsel is, of course, an independent substantive basis for granting habeas relief under the Sixth Amendment. The Court held in *Strickland* that to obtain such relief, the petitioner must establish both "deficient performance" and "prejudice." Alternatively, ineffective assistance can also serve as a so-called gateway claim. That is, as a general rule, a petitioner's failure to raise a claim in state court bars the petitioner from relying on that claim in habeas; such claims are deemed procedurally defaulted. Where a petitioner can establish "cause and prejudice" under *Sykes*, however, that default is excused. The Court has expressly held that ineffective assistance can constitute "cause" for failure to raise a claim in state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). This petition, though, asks the Court to clarify the relationship between the "prejudice" that a petitioner must show to demonstrate ineffective assistance (and thereby establish *Sykes* "cause"), and the "prejudice" necessary to meet *Sykes*'s separate prejudice prong.

A. This case presents an important question on which the circuits are divided regarding the proper analysis of ineffective-assistance-of-counsel claims in habeas corpus.

The circuit split at issue here arises against the general backdrop of the procedural default doctrine. As a general matter, habeas petitioners must present their claims to state court, and their failure to do so results in "procedural default" precluding relief on those claims in habeas. Petitioners can escape this rule only where they can establish "'cause' and 'prejudice'" for their default. *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977). That is, they must show both a good "cause" for their failure to advance the claim in state court, and "prejudice" resulting from the failure to do so. *Id.* at 84. And in *Murray*, the Court emphasized that "cause" and "prejudice" are distinct requirements. Where the "cause" is

ineffectiveness, however, the circuits have split on how to treat *Sykes*'s separate prejudice prong.

No one disputes that constitutional ineffectiveness of counsel may constitute "cause" to excuse a procedural default. *Murray*, 477 U.S. at 488. But attorney error short of constitutional ineffectiveness will not do. In the Court's words, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial." *Id.* at 492. Thus, to establish *cause* under *Sykes* (*Murray* involved *Sykes*'s cause and prejudice standard), a petitioner must meet *Strickland*'s ineffectiveness standard. But *Strickland*'s standard for ineffectiveness requires its own showing of "prejudice." That is, to establish an ineffectiveness claim under *Strickland* (which is what *Sykes* "cause" requires), a petitioner must show not only deficient performance, but also that he was prejudiced by that deficiency, *Strickland*, 466 U.S. at 687, with the latter requiring a showing that there is at least a reasonable probability that, absent the attorney's faults, a different result would have occurred, *id.* at 694. In other words, when relying on ineffective assistance as the "cause," *Sykes*'s "cause" prong incorporates *Strickland*'s "prejudice" component.

The question then is whether, and to what extent, *Sykes*'s separate "prejudice" prong requires a greater showing of "prejudice" than the *Strickland* prejudice that the petitioner must have necessarily demonstrated in meeting the *Sykes* "cause" prong. Importantly, *Murray* itself strongly implies that some greater showing is necessary. The Court, after all, held *only* that ineffectiveness could constitute "cause," *not* that it could constitute "prejudice." Good reasons support the Court's reticence to go further. For example, where the alleged ineffectiveness is appellate counsel's failure to raise a particular claim, an evaluation of prejudice under *Strickland* would necessarily involve an assessment of the merits of the claim that counsel failed to

raise. See *Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of the effective assistance of counsel be overcome." (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Obviously, a petitioner who can demonstrate "prejudice" sufficient to excuse his default, by simply showing that his defaulted claim has merit, has made a complete "end run" of the exhaustion and procedural default rules, as he has succeeded in having a court review the merits of his defaulted claim. Thus, in limiting its holding to "cause," the Court strongly suggested that "prejudice" sufficient to excuse a default involves either a showing of a different *type* of prejudice, i.e, something apart from the merits of the overlooked claim, or, more likely, a showing of a higher *degree* of prejudice, e.g., something higher than the reasonable probability of a different result that *Strickland* prejudice encompasses.

But despite *Murray*'s straightforward implications, the circuits are split on the issue. The Sixth, Ninth, and Eleventh Circuits, and arguably the Fifth, have treated the "prejudice" standards of *Strickland* and *Sykes* as virtually identical. *Martin v. Mitchell*, 280 F.3d 594, 606 (6th Cir. 2002) (implying that "actual prejudice" under *United States v. Frady*, 456 U.S. 152, 167-69 (1982), which is the same as *Sykes* "prejudice," is interchangeable with *Strickland* "prejudice"); *Deutscher v. Whitley*, 884 F.2d 1152, 1156 (9th Cir. 1989) ("Because actual prejudice is an aspect of ineffective assistance of counsel, a defendant who proves ineffective assistance need not make any additional showing to overcome procedural default."), reversed on other grounds, 500 U.S. 901 (1991); *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) (equating *Strickland* and *Sykes* standards of prejudice). See also *Cook v. Lynaugh*, 821 F.2d 1072, 1079 (5th Cir. 1987) (petitioner's showing of prejudice under *Strickland* also constituted requisite showing under *Sykes*). But see also *Johnson v. Blackburn*, 778 F.2d 1044, 1048 n.3

(5th Cir. 1985) (addressing whether counsel's failure to object to instruction gave rise to prejudice under *Strickland*, but declining to address definition of "prejudice" under *Sykes*).

However, the Fourth, Eighth, and D.C. Circuits have recognized, consistent with *Murray*, that demonstrating "prejudice" for the purposes of excusing a procedural default necessarily requires the petitioner to shoulder a heavier burden than showing "prejudice" under *Strickland*. In *Waye v. Townley*, 871 F.2d 18, 21 (4th Cir. 1989), the Fourth Circuit held, in direct conflict with the Ninth Circuit's decision in *Deutscher*, that "[e]ven assuming that Waye could show prejudice under *Strickland*, he could not demonstrate prejudice pursuant to *Wainwright v. Sykes* in order to lift the procedural bar," because "in order to overcome a waiver a petitioner must show actual prejudice in addition to showing cause." In *Zinzer v. Iowa*, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995), the Eighth Circuit observed that "the 'prejudice' component of 'cause and prejudice' is analytically distinct" from "*Strickland* prejudice," and that "the 'actual prejudice' required to overcome the procedural bar must be a higher standard than the *Strickland* prejudice required to establish the underlying claim for ineffective assistance of counsel." The D.C. Circuit similarly has held that to excuse a procedural default, the petitioner must at *least* establish prejudice under *Strickland*, and observed that "circuit precedent suggests that habeas prejudice may require a greater showing." See *United States v. Pettigrew*, 346 F.3d 1139, 1144 & n.12 (D.C. Cir. 2003), and the cases cited therein.

Finally, the Seventh Circuit has expressly noted that the question is unsettled, but has declined so far to resolve it. So, for example, in *Freeman v. Lane*, 962 F.2d 1252, 1259 & n.5 (7th Cir. 1992), the court noted that "it is an open question" whether a finding of prejudice under *Strickland* would also establish prejudice under *Sykes*, but, without

articulating a difference in the two standards, held that the petitioner satisfied both. In reaching this conclusion, the Seventh Circuit reasoned that appellate counsel's ineffectiveness *and* the trial error that appellate counsel neglected to raise "satisfied independently either standard." *Id.* at n.5. Thus, the Seventh Circuit apparently found prejudice sufficient to overcome the petitioner's default based largely on the merits of the defaulted claim. *Id.* And in another case, the Seventh Circuit again observed that the question is open, noting "there may be room for argument that *Strickland* prejudice and *Sykes* prejudice should not be equated and that the *Sykes* version is more stringent." *Rodriguez v. Young*, 906 F.2d 1153, 1159 n.2 (7th Cir. 1990).

In short, the circuits are cleanly divided and the issue is ripe for review. At least six circuits have already weighed in, and a seventh has noted the problem. Further percolation would serve little purpose, and, as described below, this split has important ramifications for habeas review.

B. Resolution of the question presented is necessary to ensure that an appropriate remedy is afforded in this case.

The circuits' disagreement on this question results in important differences in the relief available to habeas petitioners depending on the circuit in which they advance their claims. For example, the relief ordered in Franklin's case—a new trial versus a second state appeal—is dictated by whether the ineffectiveness of appellate counsel is also sufficient to excuse the default of the biased juror claim. But that inquiry, of course, may turn on whether the prejudice shown to demonstrate ineffectiveness automatically shows *Sykes* prejudice. The circuits' disagreement on that issue thus means that a defendant's remedy on habeas may turn merely on the happenstance of the circuit in which he is located.

Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct

wrongs of constitutional dimension. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Where a habeas corpus petitioner establishes a violation of the right to the effective assistance of counsel on direct appeal, by virtue of counsel's failure to raise a particular claim, the uniform view among the circuits is that the appropriate relief is to afford the petitioner a belated appeal on the issue that counsel ineffectively failed to raise. See *Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004); *Roe v. Delo*, 160 F.3d 416, 420 (8th Cir. 1998); *Mason v. Hanks*, 97 F.3d 887, 902 (7th Cir. 1996); *Bell v. Lockhart*, 795 F.2d 655, 658 (8th Cir. 1986).

But if the *Sykes* prejudice prong collapses into *Strickland* prejudice, as some circuits allow, then an ineffective-assistance-of-appellate-counsel claim serves not only as *Sykes* cause, but also as *Sykes* prejudice, thus excusing the default of an underlying claim. The appropriate remedy then (assuming the federal court determines the underlying claim to be meritorious) should be a new trial. Here, for example, the courts below determined that the alleged ineffectiveness of Franklin's appellate counsel established both cause and prejudice to excuse the default of his juror bias claim. Accordingly, without even any separate discussion of *Sykes*'s prejudice prong, the courts relied on the prejudice used to show ineffective assistance of *appellate* counsel as a basis for granting a new *trial*.

That is not to say that a case involving an ineffective-assistance-of-appellate-counsel claim, when used as a gateway to some underlying substantive claim, should never result in a new trial rather than a new appeal. Rather, the point is that in some circuits (those that do not require a separate showing of prejudice), such claims, if successful, will *always* result in a new trial, while in other circuits (those that recognize that *Sykes*'s prejudice standard requires more

than the *Strickland* prejudice used to establish cause), a petitioner may be entitled to a new appeal, without automatically becoming entitled to a new trial. Thus, the differing treatment of this issue among the circuits results in similarly-situated habeas petitioners receiving substantially different relief, based solely on the circuit in which they file.

C. The States have a vital interest in clarifying the threshold for ineffective-assistance-of-appellate-counsel claims to act as a "gateway" to the merits of otherwise defaulted claims.

Resolution of this issue is a matter of substantial importance to the States. Ineffective assistance of counsel is alleged in virtually every capital case, and it is the usual gateway through which claims never presented to the state courts are raised for the first time in federal habeas corpus. Against this backdrop, the approach adopted by the court here—treating *Strickland* and *Sykes* prejudice as the same, so that a showing of ineffectiveness actually satisfies both *Sykes*'s cause *and* prejudice prongs—works significant hardships on the States. In particular, it encourages defendants to game the system, and has the incongruous result of actually providing habeas petitioners greater relief on errors they do *not* raise during their direct appeal than on those errors that they actually do raise.

1. This case provides a textbook example of the way in which defendants can game the system if every showing of ineffective assistance of appellate counsel is sufficient, in and of itself, to establish *Sykes* cause and prejudice. Ohio law provides that prisoners may present claims of ineffective assistance of appellate counsel by requesting reconsideration or reopening of their direct appeals. The court below held that, by availing himself of that avenue, Franklin had fairly presented to the state courts his claim of ineffective assistance of appellate counsel. See *Edwards v. Carpenter*, 529 U.S. 446, 452 n.3 (2000) (claim of ineffective assistance

of appellate counsel that is procedurally defaulted cannot serve as "cause" to excuse the default of another claim). In his application for delayed reconsideration of his direct appeal, however, Franklin alleged that appellate counsel were ineffective in failing to raise *thirty-three* claims of error, one of which was the failure to raise the "biased juror" claim.

The strategy Franklin employed is readily apparent. It is untenable to argue that *all* of the purported errors listed in the application presented "clearly stronger" issues than the claims actually presented by appellate counsel, yet that is the standard he must meet to establish ineffective assistance of appellate counsel. See *Smith v. Robbins*, 528 U.S. at 288. Rather, Franklin simply sought a renewed appeal to present additional claims of error, with a view to later presenting those same errors in federal habeas corpus. By presenting his additional claims in an application to reopen his appeal based on ineffectiveness of appellate counsel, Franklin essentially preserved the option to later assert the alleged ineffectiveness of his appellate counsel as "cause" for his failure to present the claims on direct appeal in the first instance, basically allowing him to unilaterally overcome his procedural default merely though the artifice of filing the application. The possibility of such deliberate gaming is very real, and indeed, the Court recognized in *Murray* that relaxing procedural-default rules encourages such behavior, as then appellate counsel "might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for habeas corpus review should the appeal be unsuccessful." 477 U.S. at 492.

2. Indeed, the approach below not only allows habeas petitioners to circumvent state procedural rules, but also to receive better treatment in habeas of "defaulted" claims than of non-defaulted claims. As this Court has recognized, "[e]ach State's complement of procedural rules ... channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at

which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984). Ohio's contemporaneous objection rule provides generally that claims of error not objected to at trial may not be a basis for relief on appeal, absent plain error. The rule serves the state's interest in providing the trial court with the opportunity to correct error without the necessity for a re-trial, and, discourages "sandbagging," e.g., the deliberate withholding of a dispositive claim as insurance in the event of a conviction. See *Engle v. Isaac*, 456 U.S. 107, 128-130 & n.34 (1982). The Court has held that Ohio's invocation of its contemporaneous objection rule to preclude review on appeal is an adequate and independent state ground of decision that precludes relief in federal habeas corpus. *Id.* What that means, of course, is that for those trial errors raised for the first time during direct appeal (rather than at trial), an Ohio appellate court may dispose of them without considering their merits, and that holding in turn also precludes habeas review.

Against this backdrop, however, the availability of ineffective assistance of appellate counsel as "cause," where the prisoner has failed to lodge an objection at trial, actually rewards the prisoner who bypasses the normal appellate process. By raising the claim later as a basis for a collateral attack on appellate counsel's performance, rather than during direct appeal, the prisoner successfully bypasses Ohio's normal appellate process, and avoids the "plain error" standard that would otherwise apply to his defaulted claim. With this strategy, the prisoner actually obtains a "merits" review, as the court in the collateral action must address the relative merit of the defaulted claim as part of its ineffectiveness calculus. And, rather than having a "higher hurdle" to obtaining relief on collateral review, the prisoner has lowered the hurdle by successfully "end-running" the state's contemporaneous objection rule.

It matters little to the prisoner, and certainly is of no help to the State, that the claim is asserted in the guise of ineffective assistance of appellate counsel. Ostensibly, the prisoner must satisfy the two-pronged *Strickland* test, which applies both on direct appeal and collateral review. See *Strickland*, 466 U.S. at 697. As a practical matter, then, relief will ultimately depend on a showing of the merits of the previously unasserted claim. In other words, if the court upon collateral review (whether in state court or in federal habeas corpus) can be convinced that the previously unasserted claim is meritorious, then the court is apt to conclude, as the Sixth Circuit did here, that the error was so manifest that "no claims of strategy" can excuse the failure of trial counsel to object or the failure of appellate counsel to raise the claim on appeal. App. 33a.

The damage this result imposes on the finality of the State's criminal judgments is self-evident. As the Court noted in *Murray*, requiring a prisoner to raise claims initially on appeal rather than post-conviction "affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal," and "promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." 477 U.S. at 490-491, quoting *Reed v. Ross*, 468 U.S. at 10-11. But allowing the use of ineffective assistance of appellate counsel, without more, to satisfy both *Sykes*'s "cause" and "prejudice" prongs undercuts our efforts to resolve claims in state courts. To the contrary, the Sixth Circuit's approach actually encourages prisoners to *withhold* on direct appeal any claims that the state appeals court would likely classify as waived, thereby virtually guaranteeing that the claims will not be reviewed at the stage of the judicial process at which

they can be resolved most fairly and efficiently. By accepting this case for review and reversing the decision below, the Court can clarify the relationship between *Strickland* prejudice and *Sykes* prejudice, and put an end to such manipulation.

CONCLUSION

For the above reasons, the Court should grant the State's petition and reverse the Sixth Circuit's decision.

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